IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL SIDE JURISDICTION

Arbitration Application No. 264 of 2005

1. Nilesh C Sanghani
Indian Inhabitant, having address
at 12 Gitanjali Plot No. 8
Vallabh Baug Extn Road
Ghatkopar East
Mumbai 400077

2.Nilesh C Sanghani
karta of Nilesh C Sanghani HUF
Indian Inhabitant, having address
at 12 Gitanjali Plot No. 8
Vallabh Baug Extn Road
Ghatkopar East
Mumbai 400077

3. C R Sanghani
karta of C R Sanghani HUF
Indian Inhabitant, having address
at A11 Jai Savitri Building
353/B8 Vallabh Baug Extn Road
Ghatkopar East Mumbai 400077 ..Applicants

vs

1. Rakesh V Zangda
Indian Inhabitant, having address at
20 Jaygun Sagar Plot no. 57
90 ft Road, Garodia Nagar
Ghatkopar East Mumbai 400077

2. Manjari Rakesh Shah
Indian Inhabitant, having address at
20 Jaygun Sagar Plot no. 57
90 ft Road, Garodia Nagar

Ghatkopar East Mumbai 400077

3. Rakesh Zangada (HUF)
through Shri Rakesh V Zanada- karta
Indian Inhabitant, having address at
20 Jaygun Sagar Plot no. 57
90 ft Road, Garodia Nagar
Ghatkopar East Mumbai 400077

4. Comtek Software Technologies Pvt
Ltd, having its registered office at
101 Mahavir Commercial Complex
M G Road, Derasar Lane Corner
Ghatkopar East Mumbai 400077 ... Respondents

Mr R.D. Soni i/b M/s Pimenta Kapasi & Co for the applicants.

Ms Madhuri Gosar for respondents

CORAM:SWATANTER KUMAR,C.J

Judgment reserved on 20th April 2007

Judgment delivered on June 2007

JUDGMENT:

The short question that arises for consideration in the present case is whether there is binding and enforceable arbitration agreement between the parties within the scope of which disputes/ claims of the applicants can be referred to the arbitral forum in accordance with the provisions of Arbitration and Conciliation Act, 1996, hereinafter referred to as “the Act”.

2. In the year 1986, applicant No. 1 and respondent No.1 being friends entered into a partnership concern under the name and style of “Softbite” for developing and marketing software. Thereafter it was converted into a private limited company by inducting another person Mr Raju Shah and each one of the persons was holding 33 1/3% share for carrying on the business activities. Somewhere in 1999, Mr Raju Shah withdrew from th company and the business f the private limited company under the same name and style was carried out by the parties being equal share holders of the company. Some disputes and differences arose between the parties, which according to the applicants, was settled in the year 2002-2003. This led to the intervention by one Niranjan Nanawati, a leading Stock Broker, which was acceptable to both parties as they had trust and confidence in him. As a result of the intervention of the said person, an agreement was arrived at between the parties and applicant No.1 submitted his resignation as Director of respondent No.4 company. This resignation was submitted to respondent No.4 but was obviously, upon fulfillment of the conditions mentioned in the letter dated 31st March 2003. This letter was accepted and signed by respondent No.1 on behalf of the company and witnessesed by Mr.Niranjan Nanawati and Mr.

Raju Shah. One of the conditions in the said letter was that in case of any dispute in valuation, Mr. Nanawati's decision will be final. As a result of the non-fulfillment of the condition by respondent No.1 a suit was filed on the Original Side of this Court being Suit No. 2551 of 2004, which is stated to be still pending. As the subject matter of the suit in relation to valuation of shares of the company was beyond the scope of the suit, according to the applicants, it needed to be resolved through arbitration under the sole arbitration of Mr. Niranjan Nanawati in terms of the agreement.

3. Reply on behalf of respondent Nos.2, 3 and 4 was filed and while disputing the facts averred in the application, it was stated that applicant No.1 was required to pay a sum of Rs.24 lacs at the rate of Rs.1 lac per month for 24 months, as he had shown his willingness to obtain rights to market window software with two years NOC, which he had developed at the cost of the company. Applicant No. 1 was also in occupation of the premises Nos 102 to 104 owned by the company, which is agreed to be sold at market value and as per the agreement, the applicants were to pay Rs.35.50 lacs towards the said office premises. It was stated that the shares had been valued correctly.

It was also stated that Mr. Nanawati had no right or authority to act as arbitrator much less as the sole arbitrator. Besides these factual denials, the principal objection taken by the respondents is that the suit for declaration is pending before the Court. The said suit has been filed for declaration that letter Exhibit A to the application is valid, binding, subsisting contract and specific performance thereof. Thus there is no arbitration agreement between the parties and that the application under section 11 of the Act is not maintainable.

4. In order to answer the controversy raised by the parties in the present application, the court has to first examine the relevant documents. In paragraph 5 of the application certain averments have been made by the applicants in relation to the agreed terms and conditions and letter dated 31st March 2003 has been annexed as Exhibit A to the application,which reads as under:

" From
Nilesh Sanghani
12 Geetanjali Plot No.2
Vallabh Baug Extn Lane
Ghatkopar East
Mumbai 400077
Dated 31st March 2003

To
The Board of Directors
Comtek Software Technologies Pvt Ltd
101 Mahavir Comm Complex
M.G.Road Derasar Lane Corner

Ghatkopar East
Mumbai 400077

Dear Sirs.

I the undersigned Mr. Nilesh Singhani, hereby tender my resignation as Director from services of the company with effect from 31st March 2003 subject to fulfillment of below mentioned conditions:

a) NOC letter for forming the new company containing the word “Comtek” in its name from Comtek Software Technologies P Ltd (CSTPL) signed by Mr. Rakesh Zangada.

b)Once the new company is formed, transfer of the premises 102, 103 and 104 of Mahavir Complex to new company or any other name suggested by me.

c) Sale of window source code for BEATS equity and future and option package to new company along with 2 years NCA (non-competing agreement) from Mr. Rakesh Zangada /CSTPL.

d) All other assets that exists of CSTPL at market value (or book value in some cases) should be considered equally between me and CSTPL. These assets may or may not exists in books or written off as on 31st March 2003.

e) Intimation letter from CSTPL to the existing customer of window.

f) All outstanding as on 31st March 2003 pertaining to BEATS window packages will be receivable by the new company formed by me.

g) For CSTPL, any liabilities/refund arising for income tax/ sales tax as on 31st March 2003 should be contributed /distributed equally.

h) In case of any dispute in valuation Mr. Niranjan Nanawati's decision will be final.

This resignation will get cancelled if above mentioned conditions are not met upto 31st May 2003.

I am thankful to all my colleagues and staff members for their cooperation during my tenure as Director.

Yours faithfully

sd/- Nilesh Sanghani sd/- Rakesh Zangada".

It is also averred in the application that in furtherance to the above terms and conditions, which were orally agreed, applicant No.1 had submitted his resignation and the respondents having failed to discharge their obligations in terms of the agreement, arbitrator needs to be appointed. At page 22 of the application, the letter dated 31st March 2003 is signed by Nilesh Sanghani – applicant No.1 and Rakesh Zangada- respondent No. 1. 5. First of all, the letter dated 31st March, 2003, is a unilateral act which was addressed in the shape of a resignation by applicant No.1 to respondent No.3. It was signed by Rakesh Zangada, which at best can be treated as the receipt of the letter and it does not either confirm the terms stated in the letter or accept those conditions unconditionally. The letter was addressed to the

Board of Directors of the Company and in normal course it would be construed that the letter was received by the said person on behalf of the Company. It is difficult to hold that this would constitute a concluded contract between the parties. Clause (h) of the said letter again does not amount to an arbitration clause. The clause is vague in relation to a reference to the arbitration and/or the arbitral tribunal. All that the clause says is that in case of any dispute in valuation, decision of Mr Nanavati would be final. Section 2 (b) of the Act defines "arbitration agreement" which means an agreement referred to in Section 7 of the Act. As contemplated under Section 7 (1) of the Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between the parties. However, the agreement could be contained by way of a clause separately or in the main contract between the parties but the provisions of Section 7 (4) of the Act make it mandatory that the arbitration agreement is to be in writing and the document is signed by the parties by exchange of letters, faxes, etc. In other words, it would be necessary that the arbitration agreement is in writing and is signed by the parties which would

clearly demonstrate the intention of the parties to resolve their disputes and differences by reference to arbitration. It is necessary that these three ingredients should be satisfied before a person can claim appointment of an Arbitrator under the provisions of the Act. Interestingly, in paragraph 6 of the application, it is averred that the terms and conditions referred to in paragraph 5 of the application were orally agreed and thereafter the first applicant had submitted his resignation. Thus, on the own showing of the applicants, the arbitration agreement was oral. In regard to value of the shares, the decision of Mr. Nanavati is stated to be final but that by itself would not bind the parties for compulsory reference to arbitral tribunal and *per se* make Mr. Nanavati as the sole Arbitrator. In fact, the disputes between the parties do not restrict themselves only to the value of the shares. As per the disputes stated, it is the amount as well as the valuation and effect of the letter dated 31st March, 2003, which are matters of serious contentions between the parties. On record, there is no document to show that the said letter of 31st March, 2003 was accepted, agreed to or acknowledged by the other side. In the absence of such specific acceptance, clause (h) can neither be

treated as an arbitration clause by itself nor can be treated as a clause of arbitration existing as a part of a valid and subsisting contract between the parties.

6. The Supreme Court in the case of Jagdish Chander vs Ramesh Chander and ors- Appeal (Civil) No.4467 of 2002 dated 26.4.2007 discussed the law in some elaboration and while answering somewhat similar question whether a clause in the partnership deed require the parties to mutually decide to refer the dispute to the arbitration, would be an arbitration agreement or not within the meaning of the Act and held as under:

> "This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K K Modi v. K N Modi [1998 (3) SCC 573], Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. [1999 (2) SCC 166] and Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an ' arbitration

agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause

relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a

clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future.

9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be

> referred for arbitration if the parties so determine"completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under section 11 of the Act to appoint an Arbitrator does not arise."

7. The arbitration clause has to be gathered from the documents executed between the parties in the form of a

contract or otherwise, but the intent to refer to arbitration has to be express or implied. It cannot be uncertain or unmeaningful. The essential elements of an arbitration clause have been repeatedly stated in various pronouncements of the Supreme Court and the parties are to be ad-idem to make a reference of their dispute to the arbitration and such an intent must be clear from the material on record, particularly the contract relied upon between the parties. The law was in fact liberalised to the extent that where the party might have taken a stand on a mistaken or wrong understanding of the law, it is not precluded; from changing its stand, even in accordance with such clause. This principles have clearly been stated by the Supreme Court in the cases of State of Orissa and anr vs Sri Dhamodar Das- AIR 1996 SC 942, Bihar State Mineral Development Corporation and anr vs Encon Builders (I) (P) Ltd- (2003) 7 SCC 418 and Groupe Chimique Tunisien SA vs Southern Petrochemicals Industries Corpn Ltd- (2006) 5 SCC 275. In a very recent judgment of the Supreme Court in the case of Maharshi Dayanand University and anr vs. Anand Coop L/c Society Ltd and anr in Appeal (Civil) No.2133 of 2007 dated 25th April 2007, the court, though made a reference to

arbitration, while allowing the parties to raise the pleas before the arbitrator, clearly stated that existence of an arbitration clause was sine-qua-non for reference of a dispute to the arbitration. As already indicated above, in the present case arbitration clause is uncertain and in fact is not even a concluded contract between the parties. It was an offer to give resignation by the petitioner in a letter addressed to the board of directors of the respondent company. This would clearly show that there was no written contract or agreement between the parties and the endorsement by one of the respondents would not bind the company as such. In any case the arbitration clause is vague, uncertain and incapable of being construed to conclude that parties were ad-idem for referring their dispute to the arbitration.

6. In view of the above, there is no merit in this application. Same is dismissed for want of merit. However, the parties are left to bear their own costs.

CHIEF JUSTICE.